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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 138

PENNSYLVANIA MUTUAL LIFE INSURANCE COMPANY, A CORPORATION,

Petitioner,

vs.

JULIA BELEY,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA AND BRIEF IN SUPPORT THEREOF.

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INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Opinions below	1
Jurisdiction	2
Questions presented	5
Statement of the matter involved	6
Specifications of error urged	9
The conflict in Korea is war, legally and factually	9
The United States was in a technical state of war on the date of the death of insured	13
The United States is at war in Korea under international law	14
A declaration of war by Congress is unnecessary	16
The Court can take judicial notice of the fact of war without a declaration by Congress	16
Congress has recognized the existence of war in Korea	17

Table of Cases Cited

Amy Warwick, The, 1 Fed. Cas. No. 341	10
Aschenbrenner v. *U. S. F. & G. Co.,* 290 U.S. 80	9
Bas v. *Tingy,* 4 Dallas 37	10
Charleston Association v. *Alderson,* 324 U.S. 182	2
Dole v. *Insurance Co.,* 51 Maine 465	17
Ehrlich v. *U.S. F. & G. Co.,* 356 Pa. 417	9, 10
Fell v. *American Seating Co.,* 138 F. (2d) 641	17
Harding v. *Pennsylvania Mutual Life Ins. Co.,* 373 Pa. 270, 95 A(2d) 221	2
Hesse v. *Travelers Ins. Co.,* 299 Pa. 125	9
Japanese Government v. *Insurance Co.,* 101 Fed. Supp. 243	13
Kawasaki v. *Bantham Steamship Co.,* 2 K.B. (1939) 544	10

Page

Knauff v. *Shaughnessy*, 338 U.S. 537 13
Ludecke v. *Watkins*, 335 U.S. 160 13
Manhattan Life Ins. Co. v. *Cohen*, 234 U.S. 123 2
Parkhill, The 18 Fed. Cas. No. 10755a at 1196-7 10
Prize Cases, The, 2 Black 635, 67 U.S. 459 10
Talbot v. *Seeman*, 1 Cranch 1 10
United States v. *Smith*, 27 Fed. Cas. No. 16342 10
Weissman v. *Metropolitan Life Ins. Co.* (not reported) 5
Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 10

STATUTES CITED

Act of June 25, 1948, C. 646, 62 Stat. 929, 28 U.S.C. 1257(3) 2
"Attempt to Define War", Professor Clyde Eagleton (International Conciliation, June 1933, No. 291), p. 265 14
"Background Information on the Use of United States Armed Forces in Foreign Countries", Report of the Committee on Foreign Affairs, pursuant to H. Res. 28, 82d Congress, 1st Session, House Report No. 127 16
Constitution of the United States, Article I, Section 8 14
Moore, Digest of International Law, Vol. XII, p. 171 10
Mutual Defense Assistance Act of October 6, 1949, 63 Stat. 716 15
"Our Chief Magistrate and His Powers", President Taft (1916), p. 95 14
Supplemental Code of Federal Regulations, Presidential Proclamation, Vol. 3, p. 1951 15
United Nations Charter (1945, U.S. Code, Congressional Service, p. 972) 4
United States Code Annotated Appendix, Sec. 601, note, Title 50 14
Warren "The Supreme Court in United States History", Vol. II, p. 382 12
"Works of Hamilton", Vol. VIII, p. 745 15

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Pennsylvania Mutual Life Insurance Company, a corporation, prays that a writ of certiorari be issued to review a judgment of the Supreme Court of the Commonwealth of Pennsylvania entered in this proceeding on February 14, 1953, a petition for reargument therein having been denied on March 24, 1953.

Opinions Below

The decision in this case was by a divided court. Three Justices joined in an opinion (R. 40); there was a concur-

ring opinion (R. 46), and two dissenting opinions (R. 62, 72). The case is reported at 373 Pa. 235, 95 A. 2d 202. The decision in *Harding* v. *Pennsylvania Mutual Life Insurance Co.*, referred to in the opinion in the case at bar, is reported at 373 Pa. 270, 95 A. 2d 221.

Jurisdiction

The judgment of the Supreme Court of Pennsylvania was entered on February 14, 1953, and a petition for reargument having been duly filed, was denied on March 24, 1953 (R. 39, 40).

The jurisdiction of this Court is invoked under the Act of June 25, 1948, C 646, 62 Stat. 929, 28 U.S.C., Section 1257 (3), providing, inter alia, for jurisdiction of this Court to review by writ of certiorari the judgment rendered by the highest court of a State where any title, right, privilege or immunity is especially set up or claimed under the Constitution, treaties or statutes of, * * * the United States.

The Federal questions sought to be reviewed here were inherent in the case from its inception and were decided in various aspects by the three Courts which considered the case at bar. The Federal questions are substantial and were actually considered and decided by the various Courts and it is believed that the case at bar comes within the rulings of this Court in *Manhattan Life Insurance Co. of New York* v. *Cohen*, 234 U.S. 123, 134, and *Charleston Association* v. *Alderson*, 324 U.S. 182, 185, establishing that if the opinions in the State court show that Federal questions were actually considered and decided, it is irrelevant to require how and when they were raised. It is also plain, we submit, that the case at bar was not and could not be disposed of on a non-federal ground.

The County Court of Allegheny County, in which the case originated, decided that the present conflict in Korea

was a war in fact, a politically declared war as determined by the war-making powers of the United States of which the Court could take judicial notice and that the United States was participating in the Korean action by virtue of its commitments under the United Nations Charter (R. 7, 8 and 11).

The Superior Court, in reversing the County Court, ruled that the action in Korea was not a politically declared war and that the nation was not at war in Korea in the technical sense in which the word "war" was used in the insurance policy (R. 34).

In the Petition for Leave to appeal from the Judgment of the Superior Court, the present petitioner raised the following Federal questions:

> "(b) War, whether declared or undeclared, is within the meaning of the terms of the policy.
>
> (c) War, whether declared or undeclared, is an armed conflict between states, by common acceptance, understanding and definition.
>
> (d) The obligations of the United States under the Charter of the United Nations require the entrance into armed conflict upon the request or demand of the United Nations" (R. 37).

The Supreme Court of Pennsylvania affirmed the judgment of the Superior Court of Pennsylvania, ruling that the action in Korea was not a war in the technical sense in which the term was used in the policy of insurance and that as there had been no declaration of war by Congress under Article 1, Section 8, of the Constitution, these United States were not constitutionally or legally at war in Korea, and that the United States was not in a state of war on the date of the death of the insured because hostilities had actually terminated between the United States and Germany and Japan, although there had been no treaty of peace terminating the war (R. 43). It was conceded by that Court that

these United States had furnished troops, etc. for the Korean conflict as the result of its commitments under the United Nations Charter (1945, U.S. Code, Congressional Service, p. 972).

The Supreme Court of Pennsylvania also ruled that although the Constitution provides that Congress is the authority to declare war, there is no provision in regard to an authority which should have the power to declare the termination of war (R. 45).

The Supreme Court of Pennsylvania also ruled that "the existence or non-existence of a state of war is a political, not a judicial, question. It is only if and when a formal declaration of war has been made by the political department of the government that judicial cognizance may be taken thereof * * *" (R. 44).

These questions are apparent from the face of the various opinions and that the Supreme Court ruled that the word "war" means a constitutional war and that the Korean war is not a constitutionally declared war, is emphasized by the one dissenting opinion (R. 64).

The questions here involved are questions not only of substance and importance in the case at bar, but are likewise of general public interest and importance inasmuch as said questions are necessarily involved in contracts and statutes containing similar war clauses. It is also believed that the questions here involved are of national importance by reason of their international law aspect. It is suggested that a ruling by any court in these United States holding that a war in which this country is engaged is an unconstitutional war could well have serious international impacts.

It should also be pointed out that the ruling of the Supreme Court of Pennsylvania that war may not technically exist without a formal declaration by Congress is squarely in conflict with the rulings of this Court and numerous other

cases, Federal and State, as well as accepted authorities on International law. (See Petition for Reargument, R. 89-98.)

The United States District Court for the Southern District of California in *Jack Weisman* v. *Metropolitan Life Insurance Company,* in an opinion which has not been reported, has ruled, contrary to the ruling of the Supreme Court of Pennsylvania, that in a policy containing terms similar to those of the policy here involved, the conflict in Korea is a war within the terms of the policy and hence the double indemnity feature cannot be enforced.

Questions Presented

The questions here presented are:

1. Whether the conflict in Korea, in which these United States have been engaged since June 27, 1950, by virtue of its commitments under the United Nations Charter, is a technical war.

2. Whether, conceding arguendo that the court below was correct in deciding that "in time of war" was used by the parties to an insurance policy in a technical sense, the conflict in Korea, although not formally declared under Article I, Section 8, Clause 11 of the Constitution of the United States, is not a war, legally and factually.

3. Whether, on March 7, 1951, the date of the death of the insured, the United States was still in a state of war with Germany and Japan.

4. Whether, by virtue of the commitments of the United States under the United Nations Charter, a declaration of war under Article I, Section 8, Clause 11, of the Constitution of the United States is necessary.

5. Whether, under the principles of international law, the conflict in Korea is a war although not formally declared by Congress.

6. Whether, although Congress has not formally declared war under Article I, Section 8, Clause 11, of the Constitution, it has, by various legislative enactments, recognized the existence of war in Korea.

Statement of the Matter Involved

Respondent here, the beneficiary in the policy, on May 1, 1945, more than five years before the outbreak of the Korean War, obtained a policy of life insurance on her son, Andrew Beley, who was then seventeen years of age. The policy provided for a monthly premium of $2.18, including an additional monthly premium of 20¢ for double indemnity in case of accidental death. The policy included a clause limiting liability to a return of the premiums in the event that the "insured engages in military or naval service in the time of war", unless the insured shall have previously secured from the Company a permit to engage in such service. It is conceded that such a permit had not been requested or secured (R. 2-5).

Respondent also claimed "accidental death benefits" under the supplemental contract for additional accidental death benefits which was a part of the policy. This supplement provided: "Additional Accidental Death Benefit: —If the proofs of death . . . show that the death of the Insured resulted directly and independently of all other causes from bodily injuries sustained . . . through . . . accidental means, . . . then upon such proof, the Company will pay to the beneficiary of record . . . additional amount of indemnity equal to the face amount payable under said policy, . . .

"Risks Not Assumed—The Company shall not be liable for the additional Accidental Death Benefit specified if said death shall result by reason of any of the following: . . . (d) Military, air or naval service in time of war. (3) Any

work in connection with actual warfare, riot, insurrection, police duties or any act incidental thereto, either on land or water . . . (g) Intentional injuries inflicted by any other person." A termination clause also provided that the provisions for additional accidental death benefit "shall immediately terminate: . . . (b) if the Insured shall at any time, voluntarily or involuntarily, engage in military, . . . service in time of war; . . ."

Several years thereafter, Andrew Beley served in the army without the knowledge or permission of the petitioner and was killed in action in Korea on March 7, 1951. Petitioner denied liability and the respondent sued in assumpsit in the County Court of Allegheny County, Pennsylvania.

That Court entered judgment for the respondent for the amount of the premiums, according to the provisions of the policy, and consequently denied the insurance liability on two grounds: first, that the conflict in Korea was a war in fact, and, second, that the conflict in Korea had been recognized as a war by the political departments of the Government (R. 7, 8 and 11).

On appeal to the Superior Court of Pennsylvania, that Court reversed the County Court on the grounds:

(1) That the nation was not at war in Korea in the technical sense in which the word was used in the policy of insurance;

(2) That the word "war" was ambiguous and therefore the ambiguity should be construed against the insurance company;

(3) That the war was not one recognized by the political departments of the Government, being at the most an undeclared war which was not exempted by the policy and one of which the Court cannot take judicial notice; and

(4) That the United States was not in a state of war on the date of the death of the insured because hostilities had

been terminated between the United States and Germany and Japan (R. 34).

The Supreme Court of Pennsylvania granted petitioner leave to appeal and by a divided court (four to two) affirmed the judgment of the Superior Court. The majority recognized—

(1) That the conflict in Korea was a war in fact, but ruled that not having been constitutionally declared by Congress, it was not a technical war as that term was used by the parties to the insurance contract;

(2) That the Court cannot take judicial notice of the existence or non-existence of a state of war in the absence of a formal declaration of war by the political department of the Government;

(3) That although the Constitution provides that Congress has the authority to declare war, there is no provision in regard to an authority which should declare the termination of war and that the war with Germany, Italy and Japan having been in fact terminated six years before the death of the insured, which occurred on March 7, 1951, the United States was not in a technical state of war with these nations on that date (R. 43).

In his concurring opinion (R. 47), one of the Justices stated, "* * * to deny that the Korean military action is not war in its popularly accepted meaning is to deny the evidence of one's senses", but this Justice concluded that the insured met his death by an act of war but not in a state of war since the war in Korea was not a congressionally declared war and that it was not war as used by the parties to the contract because "in this connection War, in the contemplation of the law of the United States, can only mean war declared by the only authority that can declare it, i.e., Congress."

Specifications of Error Urged

The Supreme Court of Pennsylvania erred—

1. In ruling that the conflict in Korea was not a technical war because not constitutionally declared.

2. In ruling that these United States were not at war on March 7, 1951, because there is no provision in the Constitution of the United States in regard to an authority which should have the power to declare the termination of war and that hostilities had actually ceased with the Axis powers six years before.

3. In ruling that it could not take judicial notice that the conflict in Korea was war because it had not been constitutionally declared.

4. In not ruling that Congress had acknowledged the existence of war in Korea by various legislative enactments.

5. In affirming the judgment of the Superior Court of Pennsylvania.

I

The Conflict in Korea is War, Legally and Factually

There is no disagreement by the Supreme Court of Pennsylvania on the point that the conflict in Korea is war in fact. That Court has ruled that this conflict is not war in a technical sense because it has not been declared by Congress as provided by Article I, Section 8, of the Constitution of the United States. It may be observed in passing that the ruling of the Court that "war" was used by the parties to the policy in a technical sense is in complete disregard of the well settled rule that words in a contract are to be interpreted in their ordinary and normal sense: *Aschenbrenner* v. *U.S.F. & G. Co.*, 290 U.S. 80; *Hesse* v. *Travelers Insurance Co.*, 299 Pa. 125; *Ehrlich* v. *U.S.F. &*

G. Co., 356 Pa. 417; *Kawasaki* v. *Bantham Steamship Co.*, 2 K. B. (1939) 544.

It is also conceded by the Supreme Court of Pennsylvania that our troops are in Korea by virtue of our commitments under the charter of the United Nations and the Mutual Defense Assistance Act of October 6, 1949, 63 Stat. 716 (R. 42, 43 and 55-62), but it rules that because Congress has the exclusive power to declare war "it is clear that the action being waged in Korea is not a 'war' within what may be termed the 'constitutional' or 'legal' sense of that term." Reliance is had for this proposition in part on the language of Mr. Justice Jackson in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 642, but the Court has evidently completely overlooked the additional statement of Mr. Justice Jackson that "Of course, a state of war may in fact exist without a formal declaration."

We respectfully insist that the constitutional provision ex necessitate relates only to an aggressive war and that the action in Korea cannot be held to be an aggressive war. It is avowedly one for the purpose of resisting aggression. In addition, surely no one will seriously contend that if the United States is attacked, it is not at war legally or technically so-called and factually resisting the attack without waiting for Congress to declare War. This Court so holds—

Bas v. *Tingy*, 4 Dallas 37
The Prize Cases, 2 Black 635, 67 U.S. 459
Talbot v. *Seeman*, 1 Cranch 1

See also

The Amy Warwick, 1 Fed. Cas. No. 341 at 803
The Parkhill, 18 Fed. Cas. No. 10755a at 1196-7
United States v. *Smith*, 27 Fed. Cas. No. 16342

and other State cases cited in the Petition for Reargument (R. 115-116).

In the *Prize Cases*, supra, the Secretary of State, in his proclamation of blockade which was, of course, the official statement of the executive branch of the Government, had taken the position that "no war existed." The overriding issue in this case was as to whether the Civil War was a war within the meaning of the Constitution of the United States. See argument of Mr. Evarts (67 U.S. 465) where he stated:

> "War is, emphatically, a question of actualities. Whenever the situation of opposing hostilities has assumed the proportions, and pursues the methods of war, the peace is driven out, the ordinary authority and administration of law are suspended, and war, in fact and by necessity, is the *status* of the nation, until peace is restored, and the laws resume their dominion.
>
> "It is apparent, then, that whatever solemnities may be wanting in the institution of war, and whatever checks the interior structure of a government may interpose to the rash or capricious introduction of a state of war, where its introduction is at the will of a nation; the force of events may produce a war, and it will be no less a war, that it arises without solemnities and against the will of the government."

In his dissenting opinion, Mr. Justice Nelson said (67 U.S. 484):

> "Now, in one sense, no doubt this is war, and may be a war of the most extensive and threatening dimensions and effects, but it is a statement simply of its existence in a material sense and has no relevancy or weight when the question is what constitutes war in a legal sense, in the sense of the law of nations, and of the Constitution of the United States."

That the important question in the case was as to whether the war involved in the Prize Cases was a constitu-

tional war is emphasized by a letter written by Richard H. Dana, one of the Government's counsel, who wrote in part as follows:

> "These causes present our Constitution in a new and peculiar light. In all States but ours, now existing or that ever existed, the function of the Judiciary is to interpret the Acts of the Government. In ours it is to decide their legality. The Government is carrying on a war. It is exerting all the powers of a war. Yet the claimants of the vessels not only seek to save their vessels by denying that they are liable to capture, but deny the right of the Government to exercise war power,—deny that this can be, in point of law, a war. So the Judiciary is actually, after a war of twenty-three months duration, to decide whether the Government has the legal capacity to exert these war powers. * * * Contemplate, my dear sir, the possibility of a Supreme Court deciding this blockade is "illegal".
>
> Warren—The Supreme Court in U.S. History, Vol. II, p. 382.

We also call attention to the language of the Master of the Rolls in Kawasaki, etc. v. Steamship Co., 2 K.B. 544 (1939) (quoted in full in Petition for Reargument, pp. 82-88) at p. 556: "But to say that English law recognizes some technical and ascertainable description of what is meant by 'war' appears to me to be quite an impossible proposition * * *. Nobody would have the temerity to suggest in these days that war cannot exist without a declaration of war. Similarly, the recent events in the world have introduced new methods and a new technique with regard to which I conceive writers on international law will dispute for many years. I do not propose to be the first to lay down a definition of 'war' in a so-called technical sense."

II

The United States Was in a Technical State of War on the Date of the Death of Insured

If the word "war" is to be taken in a technical sense, then we respectfully insist that the United States was still in a state of war on March 7, 1951, the date of the death of the insured.

The Court ruled on this point as follows (R. 45):

> "Defendant directs some argument to the proposition that, even if it be held that the insured was not engaged in military service in time of war as far as the action in Korea is concerned, the United States was still at war with the Axis Powers when Beley was killed on March 7, 1951. Although the Constitution provides that Congress is the authority to *declare* war, there is no provision in regard to an authority which should have the power to declare the *termination* of war. It is true that for certain special purposes it may be important or even necessary for Congress or the President to declare officially a date marking a time when a war is to be considered as legally ended; indeed different such dates may be designated for various purposes. For the particular purpose here involved there was no need for a pronouncement that the war with Germany, Italy and Japan had in fact terminated some six years before Beley's death, although it may be added, as pointed out by the Superior Court in *Harding* v. *Pennsylvania Mutual Life Insurance Company*, 171 Pa. Superior Ct. 236, 241, that a joint resolution of Congress of July 25, 1947 (61 Stat. 449) did declare that, in order to terminate certain emergency and war powers, the war with those countries should be deemed ended as of that date."

As we understand the ruling of this Court in *Ludecke* v. *Watkins* (1948) 335 U.S. 160 at 168-170, this Court squarely

ruled that the war with Germany still existed until it is terminated by treaty or legislation or Presidential Proclamation. To the same effect are *Knauff* v. *Shaughnessy*, 338 U.S. 537 at 546, and *Japanese Government* v. *Insurance Co.* (D.C.,N.Y.)(1951) 101 Fed. Supp. 243. A treaty of peace was signed with Germany on October 19, 1951 (for Presidential Proclamation, see Vol. 3, p. 1951, Supplement Code of Federal Regulations) and with Japan on September 8, 1951, which was ratified by the Senate on March 20, 1952 (USCA Appendix § 601 note Title 50). The joint resolution of Congress of July 25, 1947, 61 Stat. 451, had only to do with the termination of certain emergency and war powers and was not a termination of the state of war.

III

The United States Is at War in Korea under International Law

Recognized authorities on International Law definitely state that these United States may be at war without a declaration thereof by Congress.

Thus John Bassett Moore states the rule—

> "It is universally admitted that a formal declaration of war is not necessary to constitute a state of war." Moore, Digest of International Law, Vol. XII, p. 171.

Professor Clyde Eagleton in "Attempt to Define War" (International Conciliation, June 1933, No. 291) says at p. 265—

> "It is sufficient to say that so far as customary international law goes, practice provides no support for a rule that a declaration must precede war."

and again at p. 267—

> "It would be impossible to say, in face of practice, that there is no war if there is no declaration * * *."

The late President Taft in his "Our Chief Magistrate and his Powers" (1916) said at p. 95—

> "War as a legal fact, it was decided by the Supreme Court in the Prize cases, can exist by invasion of this Country by a foreign enemy or by such an insurrection as occurred during the Civil War, without any declaration of war by Congress at all, and it is only in the case of a war of our aggression against a foreign country that the power of Congress must be asserted to establish its legal existence."

Alexander Hamilton in "Works of Hamilton", Vol. VIII, p. 745, wrote as follows:

> "But when a foreign national declares, or openly or avowedly makes, war upon the United States, they are then by the very fact already at war, and any declaration on the part of Congress is nugatory; it is at least unnecessary."

An able Senator, Cass of Michigan, had this to say on the subject—

> "The Senator from South Carolina contends that as Congress alone has the right, by the Constitution, to declare a war, therefore there can be no war till it is thus declared. There is here a very obvious error. It is certain that Congress alone has the right to declare war. That is, there is no authority in the United States, which, on our part, can change the relations of peace with another country into those of war. No authority but Congress can commence an aggressive war. But another country can commence a war against us without the cooperation of Congress. Another country can, at its pleasure, terminate the relations of peace with us, and substitute for these the relations of war, with their legitimate consequences. War may be commenced with or without a previous declaration. All of these facts prove that it is a state of hostilities which produces war and not any formal declaration." Benton, Abridgement, XV, 491, 500.

IV

A Declaration of War by Congress Is Unnecessary

It is also respectfully submitted that since our troops were dispatched to Korea by the President of the United States by virtue of the commitments of these United States under the United Nations Charter to which it is a party and the resolution of the Security Council thereof, on June 25, 1950, referring to the invasion of Korea as "* * * an act of aggression initiated without warning and without provocation in execution of a carefully prepared plan", that a declaration of war by Congress is unnecessary.

The Department of State, in a memorandum of July 3, 1950, stated—

> "Both traditional international law and Article 39 of the United Nations Charter and the resolution pursuant thereto, authorize the United States to repel the armed aggression against the Republic of Korea."

For a comprehensive treatment of this point, see "Background Information on the Use of United States Armed Forces in Foreign Countries", Report of the Committee on Foreign Affairs, pursuant to H. Res. 28, 82d Congress, 1st Session, House Report, No. 127.

V

The Courts Can Take Judicial Notice of the Fact of War Without a Declaration by Congress

The Supreme Court of Pennsylvania ruled (R. 44) that there being no declaration of war by Congress, it could not take judicial notice that the conflict in Korea was a war. This view is unsound, we submit. War is a fact and is not dependent upon declarations. We commend to this

Court as sound reasoning the language of the Master of the Rolls in *Kawasaki, etc.* v. *Steamship Co., supra,* at p. 545:

> "It is perfectly manifest, to take a simple case, that, if in any particular litigation a question arises as to whether or not this country is at war with another country, this is a matter of which the Courts of this country will take judicial notice; and, if the Courts find themselves unable from their own knowledge to take that notice, the source of information to which they must address themselves is one and one only—namely, the Executive Government, whose function it is to make war or not to make war and whose decision as to whether a state of war exists concludes the matter."

In the *Prize* cases, supra, 17 L. Ed. 459 at 477:

> "The President was bound to meet it [the Civil War] in the shape it presented itself without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact."

In *Dole* v. *Insurance Co.,* 51 Maine 465 at 470:

> "Every forcible contest between two governments de facto or de jure, is war. War is an existing fact and not a legislative decree."

The question of judicial notice is a matter of Federal law:

> *Fell* v. *American Seating Co.* (USCA 2nd), 138 F. 2d 641.

VI

Congress Has Recognized the Existence of War in Korea

Congress has, by various enactments, recognized the conflict in Korea as a war.

The dissenting opinion of the Chief Justice of this Court in *Youngstown Sheet & Tube Co.* v. *Sawyer, supra,* sets

forth numerous of these enactments as does the dissenting opinion of Mr. Justice Bell of the Supreme Court of Pennsylvania (R. 65-66).

The learned Chief Justice of this Court well said in his opinion at p. 668:

> "Congressional support of the action in Korea has been manifested by provisions for increased military manpower and equipment and for economic stabilization as hereinafter set forth."

and again at p. 669:

> "Our treaties represent not only legal obligations but show congressional recognition that mutual security for the free world is the best security against the threat of aggression on a global scale."

These enactments, we submit, constitute a legal recognition of the existence of a war in Korea by the political branch of this government, thereby eliminating the necessity for a formal declaration of war: *Bas* v. *Tingy*, supra, and *The Prize Cases*, supra, at 670.

Respectfully submitted,

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19

FILED
JUL 30 1953
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

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INDEX.

		PAGE
Answer		1
I.	No Federal Question Is Involved or Has Been Raised	1
II.	As Intended by the Language of the Contract the United States Is Not Involved In a Declared War	8

CASES CITED.

Amy Warwick, The, 67 U. S. 635 9
Aschenbrenner v. U. S. F. & G. Co., 290 U. S. 80 5
Bas v. Tingy, 4 Dallas 37 9
Bishop v. Jones, 28 Texas 294 9
Bologna v. N. Y. Life, 40 So. 2d 48 2
Charleston v. Alderson, 342 U. S. 182 4
Chicago, Ind. & L. Ry. Co. v. Hackett, 228 U. S. 559 3
Davis v. Wilson, 166 Pa. Sup. 462 2
Dorney v. Des Moines, 173 U. S. 193 5
Edward Hines, Trustees v. Martin, 268 U. S. 458 ... 5
Ehrlich v U. S. F. & G. Co., 356 Pa. 417 6
El Paso & S. W. R. R. v. Eichel, 226 U. S. 590 3
Fell v. American Seating Co., 138 Fed. 2d 641 7
Greenville Enterprise v. Jennings, 41 S. E. 2d 868 .. 9
Hamilton v. Ky. Distilleries, 251 U. S. 146 10
Hamilton v. McLaughry, 136 Fed. 445 9
Harding v. Pa. Mutual Life, 171 Pa. Super. 236 9
Henderson v. Bryan, 46 F. Supp. 682 8
Hesse v. Trav. Ins. Co., 299 Pa. 125 6

Cases Cited.

	PAGE
Hiawassee Power Co. v. Carolina Tenn. Power Co., 252 U. S. 341	5
Hunter v. Pittsburgh, 207 U. S. 161	5
Janney v. Scranton Life Ins. Co., 315 Pa. 200	2
Johnson v. N. Y. Life Ins. Co., 187 U. S. 491	3
Judge v. Prudential Life Ins. Co., 321 Pa. 454	2
Kawasaki v. Bantham Steamship Co., 2 K. B. 544	6
Kiyoshi Harabayashi v. U. S., 63 S. Ct. 1375, 320 U. S. 81	8
Ludecke v. Watkins, 68 Sup. 1429	8
Manhattan Life Ins. Co. v. Cohen, 234 U. S. 123	2
Matthews v. McStea, 91 U. S. 7	9
Mutual Life Ins. Co. v. Davis, 79 Georgia App. 340	9
Mutual Life Ins. Co. v. Hurni Packing Co., 263 U. S. 167	2
McElroth v. U. S., 102 U. S. 426	10
New York Life Ins. Co. v. Bennion, 158 Fed. 2d 260	8
New York Life Ins. Co. v. Durham, 166 Fed. 2d 874	9
Palmer v. Pokorny, 217 Mich. 284	9
Pang v. Sun Life Assurance Co., 37 Hawaii 208	9
Peoples v. McLeod, 25 Wend. 481	9
Perkins v. Rodgers, 35 Ind. 167	8
Re: First National Bank & Trust Company, 350 Pa. 125	2
Rosenau v. Idaho Mut. Ben. Assn., 145 Pacific 2d 227	8
Savage v. Sun Life Co., 57 Fed. Supp. 620	9
State of Indiana ex rel. Anderson v. Brand, 303 U. S. 95	5

Cases Cited.

PAGE

Stinson v. N. Y. Life Ins. Co., 167 Fed. 2d 234..... 2

Stipcich v. Metropolitan Life Ins. Co., 277 U. S. 311 2

The Protector, 12 Wall. 700..... 10

Trenton Chemical v. U. S., 201 Fed. 2d 776..... 12

United States v. Anderson, 9 Wall. 56..... 9

U. S. v. Anderson, 9 Wall. 56 10

United States v. Switchman's Union, 97 Fed. Suppl. 97 11

Verano v. D'Angelis Coal Co., 41 Fed. Supp. 945.... 9

West v. Palmetto State Life Ins. Co., 25 S. E. 2d 475 8

Wilson v. Cook, 327 U. S. 474..... 5

Woods v. Miller, 333 U. S. 148..... 10

Woolford v. Equitable Life, 162 Pa. Sup. 259..... 2

Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579 8

Supreme Court of the United States

OCTOBER TERM, 1953

NO. 138

PENNSYLVANIA MUTUAL LIFE INSURANCE COMPANY, a Corporation, Petitioner,

v.

JULIA BELEY, Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent, Julia Beley, makes the following Answer to the petition for writ of certiorari:

I. No Federal Question Is Involved or Has Been Raised.

Jurisdiction is invoked under the Act of 1948 providing, *inter alia,* for jurisdiction of this Court to review by writ of certiorari, the judgment rendered by the highest Court of the State where any "title, right, privilege or immunity is especially set up or claimed under the constitution, treaties or statutes of, * * * the United States." It is clear that the interpretation of the meaning of the words of the contract by the Pennsylvania Supreme Court, in the case at bar, has no application to the foregoing. Never has a federal question been raised in this case, except an attempt to do so in petitioner's application to the Pennsylvania Supreme

Court for reargument (r. 74), where your petitioner claims to have been deprived of property without due process of law, in violation of the 14th amendment, and clearly the opinion of the State Court neither enunciates nor decides any federal question. The only matter at issue was the construction of the contract, and the same was accomplished in accordance with Pennsylvania decisions: Re *First National Bank & Trust Company,* 350 Pa. 125; *Davis v. Wilson,* 166 Pa. Sup. 462; *Woolford v. Equitable Life,* 162 Pa. Sup. 259; *Stinson v. N. Y. Life Ins. Co.,* 167 Fed. 2nd 234; *Janney v. Scranton Life Ins. Co.,* 315 Pa. 200; *Judge v. Prudential Life Ins. Co.,* 321 Pa. 454; *Stipcich v. Metropolitan Life Ins. Co.,* 277 U. S. 311; *Mutual Life Ins. Co. v. Hurni Packing Co.,* 263 U. S. 167; *Bologna v. N. Y. Life,* 40 So. 2nd 48.

Manhattan Life Ins. Co. v. Cohen, 234 U. S. 123, came before the Supreme Court on a writ of error to the Court of Civil Appeals, Texas. This was a suit against insurance company, and a verdict for the plaintiff, together with statutory penalty of 12% plus attorney's fee. The case also involved the construction of certain statutes of the State of Texas and the State of Georgia. The assignments of error, however, asserted violations of rights under the constitution, but more especially assigned as error the treatment of sales of insurance policies as Texas contracts and refusing to apply the Georgia law. The Court stated:

> "It is elementary that a federal question may not be imported into a record for the first time by way of assignments of error made for the purposes of review by this Court. Moreover as a general rule it is true that for the purpose of review by this Court,

rights under the full faith and credit clause, Sec. 1, Art. IV of the Constitution, come within that class which are required to be expressly set up and claimed in the Court below. *Johnson v. N. Y. Life Ins. Co.*, 187 U. S. 491; *El Paso & Southwestern R. R. v. Eichel*, 226 U. S. 590, 597; *Chicago, Ind. and L. Ry. Co. v. Hackett*, 228 U. S. 559, 565. Let it be conceded, as we think it must be, where the record leaves no doubt that rights under the full faith and credit clause were essentially involved and were necessarily passed upon, there would be jurisdiction to review even although such rights had not been expressly asserted below (see Tilt v. Kelsey, 207 U. S. 43, 51); but the right to review under such condition being in effect but a result of the elementary rule that it is irrelevant to inquire how and when a federal question was raised in a Court below when it appears that such question was actually considered and decided."

The plaintiff, in error, complained that the Statute of Texas was repugnant to the 14th amendment, and the Court held:

"It would be indeed anomalous when the parties had both relied upon the illegality of the transaction upon grounds wholly independent of any federal right, and the case had been decided on that ground which in and of itself, is sufficient to sustain the action of the Court below, to permit one of the parties because of his dissatisfaction with the application of such principles to assert the existence of jurisdiction. Because the case rested on a federal issue, it becomes, hence, obvious that the assign-

ments of error outside of the one referred to the repugnancy of the 14th amendment * * * affords not the slightest pretext for the exercise of jurisdiction, and that, therefore, may be put out of view.

"Coming to consider the latter subject, it may not be doubted that non-repugnancy of the assailed statute * * * has been directly determined by this Court in the cases along which the lower Court based its ruling. The Court dismissed for lack of jurisdiction, finding that the case decided on purely non-federal grounds."

In *Charleston v. Alderson,* 342 U. S. 182, the case came before the Court on appeal from the State Court, involving the validity of a State Statute. This question was not raised below, but complaint was made, rather, that certain assessments violated the equal protection clause of the 14th amendment. The Court ruled that under Section 237a of the Judicial Code, there must be an explicit and timely insistence in the State Courts that a State Statute, as applied, is repugnant to the federal Constitution, treatise, or laws.

The Court held that there is jurisdiction on appeal when the decision of the State Court is in favor of the validity of a statute, and such validity need not have been raised below if the question appears to have been actually decided by that Court. Since the opinion indicated contrariwise, the appeal was dismissed. However, since the appellant had attacked the assessments under the statute as in violation of the equal protection clause of the 14th amendment, the appeal was treated as a writ of certiorari, and the case was heard on the merits.

In the case at bar, an examination of the opinion in the Pennsylvania Supreme Court indicated that the decision was based solely on the interpretation and meaning of a life insurance contract. The opinion referred to no federal question, either directly or by inference.

The following cases are further authority for the proposition that this Court has acquired no jurisdiction:

Hiawassee Power Co. v. Carolina Tenn. Power Co., 252 U. S. 341.

Edward Hines, Trustees v. Martin, 268 U. S. 458.

Wilson v. Cook, 327 U. S. 474.

Dorney v. DesMoines, 173 U. S. 193.

Hunter v. Pittsburgh, 207 U. S. 161.

State of Indiana ex rel. Anderson v. Brand, 303 U. S. 95.

Petitioner's specifications of error are not well taken. The State Court decided that by the language used in the contract, the parties intended the phrase "in time of war" to mean the period between the official and formal declaration of war by the war-making power and the date of official termination thereof by the political arm of the government.

There had been an official termination of the war with the axis powers by the Proclamation of the President on December 31, 1946 (12 Fed. Reg. P. 1) and by joint Resolution of Congress on July 25, 1947 (61 Statutes 437).

In the Aschenbrenner case, *Aschenbrenner v. U. S. F. & G. Co.*, 290 U. S. 80, the question for determination

was whether or not a passenger as intended by the contract meant a person riding on the steps of the train, rather than in the coach. The Court held that the term "passenger" was not to be given any other meaning except the ordinary meaning connoted by the term, namely the purchaser of the ticket who has or is boarding a train for purpose of conveyance.

The case of *Hesse v. Trav. Ins. Co.,* 299 Pa. 125, follows the ordinary Pennsylvania rule, namely, that a policy of insurance is to be construed most strongly against the insurer, where the language used is technical or ambiguous, but has no application in a situation where the language is plain and not subject to more than one meaning.

Ehrlich v. U. S. F. & G. Co., 356 Pa. 417, is not in point.

Kawasaki v. Bantham Steamship Co., 2 K. B. (1939) 544, involved the construction of the meaning of the term "if war breaks out involving Japan."

The case arose from the cancellation of a charter-party on the theory that war had broken out between China and Japan in 1937. The Courts sustained this position and held that the words were not to be given a purely technical construction based on principles of international law, but rather the ordinary common-sense meaning. With this proposition we have no quarrel, since the very language used by the parties intended to convey the meaning that a formal declaration of war was not necessary to constitute war as meant by the contract, because war in the general sense, namely fighting between constituent units of nations, either aggres-

sively or defensively, could "break out" and constitute a situation within the intendment and meaning of the term "if war breaks out involving Japan." The term itself means perhaps unofficial, sporadic, even unconstitutional overt acts in violation of the principles of international law. Contrast this with the language used in the case at bar, namely "in time of war", obviously meaning and intending a status position of the country which, were there no actual fighting, could be accomplished only by a political determination of that branch of the government vested with authority.

The case of *Fell v. Amer. Seating Co.*, 138 Fed. (2d) 641, is not in point involving the matter of judicial notice of State Court decisions, in accordance with Rule 43a of the Federal Rules of Civil Procedure. The District Court acquired jurisdiction by reason of diversity of citizenship and the proper jurisdictional amount in suit. No federal questions were involved and the ruling was based on the applicable State decisions.

II. As Intended by the Language of the Contract the United States Is Not Involved In a Declared War.

Your petitioner urges that the United States was in a technical state of war on the date of the death of insured. Respondent need merely reply, "war with what nation?" The State Court was correct in holding that the language used in the contract did not imply or intend other than a formal political declaration of war placing the country in the status of war, so that it could be said that following the constitutional pronouncement the United States was in "time of war."

Courts can take judicial notice that war exists or ceases only after a declaration of status by the political arm of the government.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579.

West v. Palmetto State Life Ins. Co., (1943) 25 S. E. 2nd 475.

Perkins v. Rodgers, 35 Indiana 167.

New York Life Ins. Co. v. Bennion (Utah) 158 Fed. 2nd 260.

Rosenau v. Idaho Mut. Ben. Ass'n., (1944) 145 Pacific 2nd 227 (Idaho).

Kiyoshi Harabayashi v. U. S., 1943 63 S. Ct. 1375, 320 U. S. 81, 87 L. Ed. 1774.

Henderson v. Bryan, D. C. Cal. 1942 46 F. Supp. 682.

Ludecke v. Watkins, N. Y. 1948, 68 Sup. 1429.

New York Life Ins. Co. v. Durham, C. C. A. Utah 1948, 166 F. 2nd 874.

Greenville Enterprise v. Jennings, 1947, 41 S. E. 2nd 868, 210 S. C. 163.

Mutual Life Ins. Co. v. Davis, 79 Georgia App. 340.

United States v. Anderson, 9 Wall. 56.

Matthews v. McStea, 91 U. S. 7.

Palmer v. Pokorny, 217 Mich. 284.

Bennion v. N. Y. Life Ins. Co., 158 Fed. 2nd 260.

Savage v. Sun Life Company, 57 Fed. Supp. 620.

Bishop v. Jones, 28 Texas 294.

Verano v. D'Angelis Coal Company, 41 Fed. Supp. 945.

Pang v. Sun Life Assurance Co., 37 Hawaii 208 (1945).

Peoples v. McLeod, 25 Wend. 481 (N. Y.).

Hamilton v. McLaughry, 136 Fed. 445.

Harding v. Pa. Mutual Life, 171 Pa. Super. 236.

Bas v. Tingy, 4 Dallas 37.

The Amy Warwick, 67 U. S. 635.

Petitioner relies on *Ludecke v. Watkins, supra, Knauff v. Shaughnessy*, 338 U. S. 537, and *Jap. Govt. v. Ins. Co.*, 101 Fed. Suppl. 243.

In a five to four decision, speaking through Mr. Justice Frankfurter, the Ludecke case is authority for the proposition that cessation of hostilities, or for that

matter, treaty of peace, does not necessarily proscribe the "war power" which reaches beyond the termination of war to deal with problems of law enforcement which arose during hostilities, but did not cease with them.

The enemy alien act of 1798 delegated certain powers to the President, which powers are above and beyond judicial review. The Court held that the power to be exercised by the President such as that conferred by the Act of 1798, is a process which begins when war is declared, but is not exhausted when the shooting stops. See *U. S. v. Anderson,* 9 Wall. 56; *the Protector,* 12 Wall. 700; *McElroth v. U. S.,* 102 U. S. 426; *Hamilton v. Ky. Distilleries,* 251 U. S. 146. The Court held:

> "The 'state of war' may be terminated by treaty or legislation or Presidential Proclamation. Whatever the mode, its termination is a political act. Whether and when it would be open to this Court to find that a war though merely formally kept alive had in fact ended, is a question too fraught with gravity even to be adequately formulated when not compelled."

In the dissenting opinion, Justice Black opined: "Of course, it is nothing but a fiction to say that we are now at war with Germany." Although the majority opinion cited the case of *Woods v. Miller,* 333 U. S. 148, as having held that war with Germany had not yet terminated, such apparently was not the case. The Court, there, dealt with the constitutional war powers of Congress, which are not necessarily extinct at the termination of actual hostilities. Both the opinion of Mr. Justice Black and Mr. Justice Douglas were emphatic that in peace

time an alien is protected by the due process clause of the 5th amendment.

The *Knauff* case, also concerning the admission of an alien to the United States, held that the war power of the President acting through the Attorney General transcended not only the cessation of hostilities, but the political termination of the war. The Court held that the Attorney General's edict refusing admission stemmed from the Act of May 27, 1941, proclaiming a National Emergency, and had no connection whatsoever with the beginning or termination of the war by the political arm of the government. The Supreme Court, speaking through Mr. Justice Minton, in a four to three decision, held that the action of the Attorney General's office, was not reviewable since not expressly authorized by the Act, and that for security reasons a public hearing could not be demanded, because disclosure might be detrimental to the public interest.

The case of *Japanese Gov't. v. Commercial Casualty Ins. Co., supra,* involved the question of whether or not the Japanese Government could maintain an action for breach of contract prior to the ratification of a treaty of peace and during a technical state of war. The Court held that since the Japanese Government was not autonomous in that the Civil Administration of Japan was under the control of the military, there was no *de jure* standing to maintain the action.

United States v. Switchman's Union, 97 Fed. Suppl. 97, was in accord, and held that the exercise of the war power of the Executive under a National Emergency

transcended political considerations and was not reviewable by the judicial; *idem*: *Trenton Chemical v. U. S.*, 201 Fed. (2nd) 776.

WHEREFORE, respondent respectfully prays your Honorable Court that the petition for writ of certiorari be denied.

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